Supreme Court, U.S.
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No. 89-1222

In The

Supreme Court of the United States

October Term, 1989

PERVESE AHKTAR, d/b/a CIRCLE MOBILE,

Petitioner,

v.

BIRD OIL COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The Respondent filed a suit against Petitioner for violation of the Petroleum Marketing Practices Act in connection with an operating service station, which was settled in open court on March 3, 1987. All of the terms were stated on the record in the presence of the District Judge and counsel. The terms of the settlement included an agreement by Respondent to sell the service station to Petitioner for $450,000.00. The settlement terms included the rectification of the soil contamination at the site, the cost of which would be absorbed by Respondent up to $100,000.00 and the balance to be assumed by Petitioner. Final Department of Health and Environmental Control approval was procured on March 28, 1988. Under the terms of the agreement the closing was therefore to be no later than May 27, 1988. The Petitioner then disputed that he was to pay any part of the remedial expense (notwithstanding the agreement in open court). Respondent refinanced the property in order to pay the creditors of the remediation project and other mortgage holders. The Court by Order dated May 5, 1989 directed the closing to occur on June 8, 1989. The Petitioner sought to amend the judgment or a new trial which was denied by Order of the Court of July 12, 1989, which Order also directed the closing to occur on July 24, 1989.

The Orders of May 5, 1989 and July 12, 1989 required strict compliance with Rule 62(d) and the posting of a bond equal to the amount due at closing.

The Petitioner's motion for a stay was denied by the Circuit Court on July 21, 1989, which was three days prior to the closing date set by the District Court.

The Circuit Court dismissed the appeal on October 2, 1989, refused to reconsider on October 30, 1989, and refused to reinstate the appeal on February 2, 1990.

The amount due by Petitioner at closing was $450,000.00 plus $96,441.99 for soil remediation (of which $71,851.52 had been advanced by Respondent) plus interest plus $21,840.47 owed by Petitioner to a supplier of services.

A chronology is attached in the Appendix Page 7 of this Brief.

REASONS FOR DENYING THE WRIT

The Petition for the Writ should be denied because:

I. Failing to post a supersedeas bond was not the sole reason for dismissing the appeal;

II. Petitioner has made no showing of the inability to post the bond;

III. Petitioner has violated the Order of the Court requiring the completion of the sale;

IV. This case involves the failure of the Petitioner to comply with a settlement and presents no special or important reasons for review by the Supreme Court;

V. Petitioner has not complied with Rule 62(d) of the Federal Rules of Civil Procedure;

VI. The issue of the bond is moot;

VII. The bond requirement was a part of the Court's Order and not merely a rule of the Court;

VIII. Petitioner has made no showing that the appeal has any merit.

I.

FAILING TO POST A SUPERSEDEAS BOND WAS NOT THE SOLE REASON FOR DISMISSING THE APPEAL

The question set forth in the petition incorrectly poses the issue. The record does not support the dismissal as being based upon the failure or inability to post a bond. The Order of the Circuit Court granted the Respondent's Motion to Dismiss after considering the motion and the responses thereto; it did not specify the grounds. The Motion to Dismiss did not rest on or only upon the failure to file the supersedeas bond. The Motion to Dismiss asserted that the Petitioner failed to post security for the appeal, failed to close on the property in violation of the Court's Order of July 12, 1989, that Petitioner had slept on his rights and had nothing at risk to be protected by appeal and that the underlying issues had been decided as a result whereof the appeal became moot. (See Motion, Appendix page 1).

II.

PETITIONER HAS MADE NO SHOWING OF THE INABILITY TO POST THE BOND

The question set forth in the petition incorrectly poses the issue. The record does not establish an inability to post a bond; it establishes a failure, a decision not to

post a bond. There is no evidence that the value of the service station site which is the subject of this suit is other than sufficient alone to support the sales price. The record does not address the financial ability of the Petitioner. Even so, the added interest charges have been due to the failure of Petitioner to close the sale. The reverse of that coin is that Respondent has spent $171,851.52 in soil remediation (Order of May 5, 1989, page 25 of Petition).

III

PETITIONER HAS VIOLATED THE ORDER OF THE COURT REQUIRING THE COMPLETION OF THE SALE

Given the course of this litigation, the expenditures which have been occasioned by Respondent, the repeated failure of the Petitioner to close the sale (See Chronology, Appendix 7), and the inclusion of the supersedeas bond requirement in two Orders by the District Judge, Rule 62(d) is not the limited issue. Of course, no bond has been filed, no amount of bond tendered, no bond has been approved by any Court, and no stay has been granted. The course of this litigation, the financial burdens imposed upon the Respondent by reason of the failure of the Petitioner, and the express settlement agreement in open court which has not been the subject of compliance by Petitioner are significant and basic reasons for the Judge to have included in his Orders that there must be strict compliance with Rule 62(d). Compliance became a part of the orders, not an adjunct. The Petitioner imposed that condition upon himself.

IV

THIS CASE INVOLVES THE FAILURE OF THE PETITIONER TO COMPLY WITH A SETTLEMENT AND PRESENTS NO SPECIAL OR IMPORTANT REASONS FOR REVIEW BY THE SUPREME COURT

There are no special or important reasons to grant certiorari. This case simply involves a failure of one party to comply with the terms of a contract, even after repeated hearings and delays. This case involves the use of the property of an owner by a non-owner and the Petitioner doesn't want that free use to stop now. The Petitioner is in possession of the Respondent's property.

V

PETITIONER HAS NOT COMPLIED WITH RULE 62(d) OF THE FEDERAL RULES OF CIVIL PROCEDURE

There was no compliance with Rule 62(d) of the Federal Rules of Civil Procedure.

VI

THE ISSUE OF THE BOND IS MOOT

The supersedeas bond issue is moot because the District Court Judge made a determination on the merits which has been sustained by the Circuit Court. No right of Petitioner changed during that period. A stay or supersedeas bond issue cannot survive the determination and final resolution of the primary issue, which is now concluded. No right of Petitioner changed during the course of the period between the issue of the Order of the District Court and the dismissal, or between refusal to consider and refusal to reinstate the appeal by the Circuit Court.

VII

THE BOND REQUIREMENT WAS A PART OF THE COURT'S ORDER AND NOT MERELY A RULE OF THE COURT

The inclusion of the bond requirement in the Order from which the appeal was taken, after the history of this litigation, gives it a different status than a mere Rule of Court. This is illustrated in *MacNeil Bros. Company v. Forte*, 253 F.2d 500 (1st Cir., 1958), wherein the Court noted it had dismissed appeals in two cases where there was a failure to file a bond after "we had ordered the same to be filed."

One who misuses the Courts, creates delays and seeks an advantage not based on merit should harvest the crop he sows. The Court recognized this in *MacNeil Bros. Co. v. State Realty Company of Boston, Inc.*, 262 F.2d 364 (1st Cir. 1959), where an appeal was dismissed for failure to file a bond for costs. The course of the present litigation and the recitations in the order of the District Judge have a similar ring. See also *Hargraves v. Bowden*, 217 F.2d 839 (9th Cir. 1954).

A dismissal of an appeal for more than one reason, including the failure to file a bond, has been recognized in *Beecher v. Smithson*, 205 F.2d 113 (9th Cir. 1953), and *Hagan v. Whitman*, 356 F.2d 742 (9th Cir. 1966); such consideration is appropriate here.

The following Rules are relevant as to the relief granted to this Respondent in the Circuit Court;

(a) Rule 1 of the Rules of Civil Procedure provides that the Rules are to be construed to secure the just, speedy, and inexpensive determination of every action.

(b) Rule 55 of the Rules of Civil Procedure provides for default where a party fails to plead or otherwise defend as provided "by these rules".

(c) Appellate Rule 8(b) provides that any relief available in the Court of Appeals may be conditioned upon the filing of a bond or other appropriate security.

VIII

PETITIONER HAS MADE NO SHOWING THAT THE APPEAL HAS ANY MERIT

Petitioner makes no showing that his appeal has any merit. To the contrary, the appeal is totally lacking in merit. The Petitioner blatantly defies a settlement placed on the record in open court and is attempting further delay in fulfilling his settlement obligations. The Petitioner is abusing the judicial process and this abuse should not be permitted.

CONCLUSION

This continuing refusal to consummate the settlement and complete the sale should not be delayed any longer. This case does not present any substantial question deserving the attention of the United States Supreme Court. Accordingly, the Petition for the Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

PLAINTIFF'S (RESPONDENT'S) MOTION TO DISMISS OR REMAND APPEAL

Plaintiff respectfully moves to dismiss Defendant's appeal. Defendant has failed to post security for the appeal. Defendant has failed to close on the property in violation of the District Court's Order of July 12, 1989. Defendant has slept on his rights and there is nothing at risk to Defendant that is entitled to protection by a preservation of this appeal. This Court has already decided the underlying issues on appeal and the appeal is now moot.

Plaintiff, by Order of the District Court, was entitled to compliance by Defendant with Federal Rule of Civil Procedure 62(d) and to have Defendant post a supersedeas bond in the event Defendant intended to appeal the decision of the Court. The District Court specifically ordered that Defendant had to post a bond. See footnote 37 on page 25 of the District Court's Order of May 9, 1989. The Defendant failed or refused to comply with the Order requiring a bond and appealed anyway. See Order of the District Court of July 12, 1989 at page 5. The District Court refused to stay its Order. This Court has likewise refused to stay relief by its order of July 21, 1989. No undertaking to post a bond has been made by Defendant to date. Since the filing of a bond for costs was required, the failure to make application for security is ground for such action as this Court deems appropriate which may include the dismissal of the appeal. See FRAP 3(a). Plaintiff submits that not only is the sanction of dismissal appropriate in this case, it should be invoked as punishment for Defendant's contemptuous conduct in

this litigation. Failure to give security has been a ground for dismissal of an appeal. See *MacNeil Bros. v. State Realty Co. of Boston, Inc.*, 262 F.2d 364 (Ca 1st 1959); *MacNeil Bros. v. Forte*, 253 F.2d 500 (CA 1st 1958); *Beecher v. Smithson*, 205 F.2d 113 (CA 9th 1953); and *Hagan v. Whitman*, 356 F.2d 742 (CA 9th 1966). Dismissal should be appropriate where the rules are deliberately flouted, the appellee is prejudiced by the appeal or the appellant engages in bad faith.

The Defendant has deliberately sought to by-pass the order of the district court to post a supersedeas bond. This Court has denied him similar relief. The status of this appeal without affirmative action by this Court gives Defendant the right to contest being required to close on the property without putting up a stay bond to off-set injury to appellee during the appeal. Defendant, again, gets what he wants without having to do anything. Bird Oil Company, Inc. is thereby prejudiced. Other parties have made offers to purchase the property from appellee since Defendant will not close on the property as ordered by the district court. Bird Oil Company will lose its ability to mitigate damages proximately flowing from Defendant's contemptuous refusal to close on the property. If the Court does not act quickly, the offer to Bird Oil Company to purchase the property will be lost. Defendant has indicated that he will attempt to stymie or prevent the sale of the property to anyone other than himself. Since Defendant will not comply with the order of the district court to buy the property, nobody will be able to. He has also indicated that he will place a lis pendens on the property to interrupt or prevent any sale

by Bird Oil Company, as appellee, to a third party. Plaintiff submits that Defendant's refusal to comply with an order of the Court to close on the property, an order of the Court to post a stay bond if an appeal be taken, and Defendant's indication that he will prevent a sale of the property by Bird Oil Company to a third party is sufficient cause for relief from this Court in favor of appellee. Defendant has flouted the rules of the Court, prejudiced appellee, and manifested bad faith in continually delaying his obligation to close and further indicating that he will prevent Plaintiff from attempting a sale to third parties to mitigate against its damage.

Plaintiff submits that Defendant-Appellant has slept on his rights. There is nothing at risk to Defendant that should be protected by a preservation of the appeal. Defendant, in violation of the district court orders of May 9, 1989 and July 12, 1989, has failed to close on the property. This Court also denied Defendant's request to be relieved from having to close. The Defendant refused, thereafter, to exercise his rights to purchase the property. He is now in contempt of the order of judgment. The appeal taken by him was from an order to buy the property. It lacks merit. The relief that he attempts by his appeal is to buy the property after it has been cleaned. He submits that being obligated to buy the property now is an error of law. If his contention on appeal is correct, the appeal would protect any damage suffered by his having to buy the property. before the property has been sufficiently remediated. He has no protectable right by appeal unless he submits to buying the property. He has indicated he cannot afford to currently do so. The appeal becomes merely an attempt to further delay an obligation

to purchase that he has not exercised. Unless exercised, he has no justiciable wrong that the preservation of an appeal can vindicate. In effect, Defendant has nothing at risk to appeal from unless he closes on the property and he has chosen not to do that.

Plaintiff also submits that this Court, by deciding Defendant's motion to stay, has also reached and rules upon Defendant's underlying issue on appeal. The appeal is now moot. Defendant's issue on appeal is the efficacy of the district court's orders requiring that he purchase the property that he agreed to buy in the settlement reached between the parties. He claims that he should not have to buy the property until it has been completely cleaned up. He objected to the district court ordering him to buy the property in its present condition. He requested that this Court relieve him from having to perform in accordance with the order of the district court. This Court declined to provide him relief; in effect requiring that he abide by the very same order that he takes exception to by appeal. His appeal is, therefore, moot because the Court has reached the merits of the issue on appeal.

Bird Oil Company respectfully requests that it be granted relief by this Court. Other people are now interested in buying the property that Defendant will not buy and wants to prevent others from purchasing as well. Plaintiff would like to sell the property but cannot do so without an order dismissing the appeal, remanding case back to district court for further proceedings in light of Defendant's contempt of the order of judgment, or an order allowing Plaintiff to sell the property free and clear of Defendant's interest in possession and right of purchase. Either Defendant buys the property or gives up all

rights to it. Defendant should not be allowed through appeal to refuse to purchase the property and hinder others from desiring to purchase as well. Appropriate relief should be fashioned to protect Plaintiff-Appellee in this case.

Respectfully submitted,

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August 22, 1989

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2423

Bird Oil Company	Plaintiff – Appellee
versus	
Perverse Akhtar, d/b/a Circle Mobil	Defendant – Appellant

ORDER

Upon consideration of appellant's motion to reinstate appeal and appellee's response to the motion,

IT IS ORDERED that the motion to reinstate appeal is denied.

Entered at the direction Judge Russell with the concurrence of Judge Sprouse and Judge Wilkins.

For the Court – By Direction

/s/ John M. Greacen
CLERK

Filed

February 2, 1990

Chronology

Suit instituted	– 5/21/86
Suit settled and terms stated in open court	– 3/3/87
Respondent refinances loan on the property for $430,000	– 3/31/88
Respondent secures second mortgage on property for $45,000	– 3/31/88
Respondent pays mechanic's lien ($37,106.66)	– 4/8/88
Hearing to enforce performance	– 9/29-30/88
Order setting performance date	– Order of 3/3/89
Respondent ready to close sale on May 27, 1988	– Order of 5/5/89
Closing date for sale set for June 8, 1989	– Order of 5/5/89
Notice of appeal	– 7/6/89
Order to compel closing on July 24, 1989	– 7/12/89
Motion to stay is denied 4th Circuit	– 7/21/89
Order of 4th Circuit dismissing appeal	– 10/2/89
Order of 4th Circuit dismissing motion to reconsider	– 10/30/89
Motion to reinstate appeal	– 11/10/89
Order refusing to reinstate appeal	– 2/2/90